

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

<i>JEANETTE CALNAN,</i>)	
)	
<i>Plaintiff</i>)	
)	
v.)	<i>Civil No. 95-395-P-H</i>
)	
<i>SHIRLEY S. CHATER,</i>)	
<i>Commissioner of Social Security,</i>)	
)	
<i>Defendant</i>)	

REPORT AND RECOMMENDED DECISION¹

This proceeding challenges the Commissioner’s retroactive recalculation of the Social Security Disability (“SSD”) benefits to which the plaintiff is entitled, in light of a finding by the Commissioner of “fraud or similar fault” in connection with the plaintiff’s failure to disclose to the Social Security Administration on a timely basis the most recent of her four marriages. In the

¹ This action is properly brought under 42 U.S.C. § 405(g). The Commissioner has admitted that the plaintiff has exhausted her administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 26, which requires the plaintiff to file an itemized statement of the specific errors upon which she seeks reversal of the Commissioner’s decision and to complete and file a fact sheet available at the Clerk’s Office. Oral argument was held before me on December 9, 1996 pursuant to Local Rule 26(b) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

Just prior to oral argument, counsel for the plaintiff filed a motion to withdraw his appearance and a motion to continue the argument. In the latter, counsel indicated that the plaintiff had filed a complaint with the Maine Board of Bar Overseers about him. In the former, counsel reported an allegation by the plaintiff that he was representing the interests of the Commissioner rather than his client. I took these matters up with the plaintiff personally in open court. At that time, the plaintiff indicated on the record that she withdrew her allegations concerning her attorney and wished him to proceed with the oral argument. For his part, counsel acknowledged that he was prepared and willing to proceed. Accordingly, I denied the motion to withdraw and counsel then withdrew the motion to continue.

Statement of Errors filed on behalf of the plaintiff by her attorney,² the plaintiff raises three issues: (1) the propriety of reopening prior benefits determinations in connection with the instant proceeding, (2) whether the finding of “fraud or similar fault” is supported by the record and was legally proper, and (3) whether the Commissioner failed to take into account the plaintiff’s limitations in the context of making such a finding, as required by regulation.³ I recommend that the court affirm the decision of the Commissioner.

I. Background

The instant proceeding began in 1991, when the plaintiff filed an application for widow’s benefits on the record of her fourth husband, Frank E. Nadeau. Record p. 143. The plaintiff was married to Nadeau from 1967 until his death in 1978. *Id.* at 153.

Following a hearing at which the plaintiff testified, the Administrative Law Judge determined that the plaintiff had received a net overpayment of \$3,840.72 from the Social Security Administration by virtue of her failure to disclose this marriage prior to her 1991 application. *Id.* at 18, 22 (Finding 3), 23 (Finding 5). The Administrative Law Judge found that, had the plaintiff

² In addition to the filings made by her attorney, the plaintiff has herself filed what appears to be a page-by-page analysis of the administrative record, asserting numerous factual errors. The Social Security Act authorizes judicial review only of a “final decision of the Commissioner” made after a hearing. 42 U.S.C. § 405(g). The court is therefore without jurisdiction to review alleged errors in the administrative record because the documents in the record are not themselves final decisions of the Commissioner. The plaintiff has also filed an assortment of original papers, including correspondence, which is not part of the administrative record. From all that appears, the plaintiff has not made any effort to have any of these papers accepted as part of that record. I have accordingly disregarded these documents in my analysis and recommended disposition.

³ The Statement of Errors also raised the issue whether the Commissioner properly applied the so-called “windfall offset” regulations in deducting the amount of Supplemental Security Income (“SSI”) benefits the plaintiff received from certain retroactive SSD benefits due to her. At oral argument, the plaintiff conceded through counsel that the Commissioner did not err in this regard.

informed the Social Security Administration of this marriage when she first sought Social Security benefits in 1972, as required, she would not have been entitled to \$18,871.50 in benefits that she otherwise received both on her own record and that of one of her previous husbands. *Id.* at 22, 23 (Finding 8). The Administrative Law Judge made a finding, pursuant to 20 C.F.R. §§ 404.988(c)(1) and 416.1488(c), of “fraud or similar fault” in connection with the non-disclosure, which had the effect of authorizing him to reopen previous benefits determinations. Record p. 23 (Finding 7). Remarking on the plaintiff’s receipt of SSI benefits beginning in 1974, he (1) noted such a beneficiary’s duty to seek all other Social Security benefits to which she is entitled, and therefore deemed her to have applied for benefits on Nadeau’s record as of the date she would have been eligible to receive them, and (2) invoked the so-called “windfall offset” provisions of 20 C.F.R. § 404.408b to reduce by \$7,923.22 in already-paid SSI benefits the sum to which he deemed her entitled on the Nadeau record. Record pp. 20, 21, 22 (Finding 4), 23 (Findings 9 and 12). The bottom line was a determination that the plaintiff owes the Social Security Administration the previously mentioned sum of \$3,840.72. The Appeals Council affirmed the decision, *id.* at 5-7, making it the final determination of the Commissioner, 20 C.F.R. § 404.981; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The Administrative Law Judge’s carefully documented solution to the issues presented in this proceeding is a thoughtful effort to place the plaintiff in the same position she would have been had she properly disclosed all of her marriages to the Social Security Administration. Upon a thorough and careful review of the entire administrative record I find no basis for disturbing this decision.

II. Due Process

At oral argument, counsel for the plaintiff took the position that the Commissioner was without authority to reopen the pre-1991 determinations in light of the First Circuit's decision in *McCuin v. Secretary of Health & Human Servs.*, 817 F.2d 161 (1st Cir. 1987). At issue in *McCuin* was the authority of the Appeals Council to reopen, *sua sponte*, a prior determination for "good cause" pursuant to 20 C.F.R. § 404.988. *Id.* at 163. The decision had been issued eight months previously and had otherwise become final. *Id.* at 163, 173. Finding "serious substantive and procedural due process problems that would result from the [Commissioner's] reading of the regulations," the First Circuit determined that they "should be interpreted as allowing reopening only on the basis of motions by claimants," as opposed to the administrative agency. *Id.* at 174. I conclude that *McCuin* is inapposite here for three reasons.

First, the plaintiff did not make a due process argument in her Statement of Errors, alleging simply that the Commissioner "did not properly reopen" the prior determinations. Plaintiff's Statement of Errors (Docket No. 9) at 1. It is a firmly rooted canon of appellate practice that an issue raised for the first time at oral argument will be deemed to have been waived except in extraordinary circumstances. *Piazza v. Aponte Roque*, 909 F.2d 35, 37 (1st Cir. 1990). The waiver doctrine set forth in *Piazza* is grounded in Federal Rule of Appellate Procedure 28(a), which requires an appellant to provide a written statement of the issues presented for review. Unlike that rule, Local Rule 26(b)(1) does not obligate Social Security appellants appearing here to brief their arguments fully prior to oral argument, but the Local Rule does require an "itemized statement of . . . specific errors." Loc. R. 26(b)(1). This requirement is designed to inform the Commissioner, as the appellee, "of the scope of the appeal and enables him or her to prepare . . . arguments accordingly." *Piazza*,

90 F.2d at 37; *see also James v. Chater*, 96 F.3d 1341, 1343-44 (10th Cir. 1996) (presenting issues in Social Security appeal in “conclusory” fashion “effectively sandbags” administrative tribunal); *Marshall v. Chater*, 75 F.3d 1421, 1426 (10th Cir. 1996) (due process issue concerning reopening for “fraud of similar fault” waived at circuit level when not presented to Appeals Council or magistrate judge).

Second, the due process concerns so forcefully laid out by the First Circuit in *McCuin* are not implicated here. At issue in *McCuin* was a determination that the Appeals Council opted to reopen well after the normal period for appeals from the decision of the Administrative Law Judge, purely because the Council determined that the decision contained an error of law. *McCuin*, 817 F.2d at 163. Notwithstanding the language in section 404.988(b), which permitted the reopening for “good cause” of such determinations for a period of four years, the First Circuit noted that “[n]o other tribunal would be permitted to announce to a party that it has made a decision but that it reserves the right to change its mind” for so long. *Id.* at 173. In holding that such a framework is inconsistent with the basic due process notion that claimants are entitled to a final answer from the Social Security Administration, the First Circuit explicitly noted that, “in cases where the claimant is at fault,” it is permissible for the agency to do exactly what it did here: determine that it is entitled to recover an overpayment. *Id.* at 174 (emphasis in original).

Finally, a glitch in the regulations that proved to be constitutionally and logically troublesome in *McCuin* has since been revised out of existence. At the time *McCuin* was decided, 20 C.F.R. § 404.987, which sets forth the procedure for reopening determinations of SSD benefits, referred only to reopenings initiated by claimants. *See McCuin*, 817 F.2d at 169 (quoting former text of regulation). Then, as now, section 404.988 of the regulations described the substantive requirements

for the reopening of prior determinations under section 404.987. The First Circuit struggled with the apparent inconsistency between section 404.987, which authorized only claimant-initiated reopenings, and section 404.988, which included a ground (fraud or similar fault) that no claimant would ever logically invoke. *Id.* at 169-71. Because there was “no reading which would not stretch the language of the regulations to a considerable extent,” the court reasoned that “an interpretation comporting with the requirements of due process would best carry out the intent of Congress in passing the statute authorizing the regulations.” *Id.* at 171 (emphasis in original). Addressing this problem, the Social Security Administration amended section 404.987 effective on February, 24, 1994 to provide that the Social Security Administration may reopen a determination on its own initiative. 59 Fed. Reg. 8532, 8533, 8535 (1994). This amendment antedated the Administrative Law Judge’s decision of November 16, 1994. Record p. 24. Accordingly, the problem addressed in *McCuin* -- the possibility of “putting claimants in a state of limbo . . . uncertain of the final outcome of their cases” because of the agency’s assertion of a right to reopen cases for good cause, *McCuin*, 817 F.2d at 174 -- is not implicated by the decision under review here.

III. Other Issues

The remaining issues raised by the plaintiff do not require extensive discussion. The court must affirm factual findings that are supported by substantial evidence. 42 U.S.C. § 405(g); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). All of the Administrative Law Judge’s findings are fully supported -- including the finding of fraud or similar fault. *See Heins v. Shalala*, 22 F.3d 157, 159 (7th Cir. 1994) (discussing definition of fraud); Social Security Ruling 85-23 reprinted in *West’s Social Security Reporting Service* at 372 (1992) (“similar

fault” established if claimant “knowingly did something wrong” without intent to defraud); *Barone v. Bowen*, 869 F.2d 49, 52 (2d Cir. 1989) (distinguishing “similar fault” from “honest mistakes”). Further, the Administrative Law Judge made clear that he considered, and rejected, the possibility that mental, educational or linguistic limitations might account for the fraud or similar fault, Record pp. 18-19, a finding that clearly has a substantial evidentiary basis.

At oral argument, relying solely on the text of the applicable regulations, the plaintiff took the position that the Administrative Law Judge was required to make a specific finding that, at the time each previous application was made, the plaintiff was not under one of the disabilities that the Commissioner has deemed by regulation to be relevant to such a determination. I conclude that the Administrative Law Judge complied with the regulations. In relevant part, they provide simply that a determination may be reopened at any time if “[i]t was obtained by fraud or similar fault (see § 416.1488(c) of this chapter for factors which we take into account in determining fraud or similar fault).” 20 C.F.R. § 404.988(c). Section 416.1488(c), in turn, provides:

In determining whether a determination or decision was obtained by fraud or similar fault, [the Commissioner] will take into account any physical, mental, educational, or linguistic limitations (including any lack of facility with the English language) which you may have had at the time.

20 C.F.R. § 416.1488(c). In considering an issue deemed to be relevant pursuant to the Commissioner’s regulations, the Administrative Law Judge should set forth findings that “mak[e] it possible for a reviewing tribunal to know that the claim was not entirely ignored.” *Figueroa v. Secretary of Health & Human Servs.*, 585 F.2d 551, 554 (1st Cir. 1978); *see also Marshall*, 75 F.3d at 1427 (substantial evidence supported finding of fraud or similar fault where record “replete with evidence” that claimant made incorrect statements concerning earnings and/or withheld such

information). It is more than apparent from the findings made by the Administrative Law Judge that he considered the issue but found the plaintiff to have been under none of the disabilities set forth at section 416.1488(c) both at the times she made her prior applications and, to the extent not contemporaneous with those applications, at the times she made the misrepresentations concerning her marital status.

IV. Conclusion

For the foregoing reasons, I recommend that the decision of the Commissioner be **AFFIRMED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 12th day of December, 1996.

*David M. Cohen
United States Magistrate Judge*